JD–88–16
Portsmouth, VA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

KROGER LIMITED PARTNERSHIP I
MID-ATLANTIC

and **CASE 5–CA–155160**

UNITED FOOD AND COMMERCIAL
WORKERS UNION LOCAL 400

*Stephanie Cotilla Eitzen, Esq., f*or the
General Counsel.
King F. Tower, Esq. (Woods Rogers, PLC),
for the Respondent.
Carey R. Butsavage, Esq. & Blaine Z. Taylor, Esq.
(Butsavage & Durkalski, PC), for the
Charging Party.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Norfolk, Virginia, on March 29, 2016. The United Food and Commercial Workers Union, Local 400 (the Union/Local 400/Charging Party) filed the charge in this case on June 30, 2015,[1] and the General Counsel issued the complaint on December 31, 2015.[2] The complaint alleges that Partnership I Mid-Atlantic (Respondent/Employer) violated Section 8(a) (1) of the National Labor Relations Act (the Act) when it discriminatorily enforced a no-solicitation/distribution rule by prohibiting certain of the Union's representatives from soliciting signatures on a petition in the parking area adjacent to its facility; demanding that they leave that area; and calling the police to remove them from the area. In its timely filed answer, Respondent denied the alleged violations of the Act and asserted several affirmative defenses.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

---

1 All dates are in 2015 unless otherwise indicated.

2 For brevity purposes, Counsel for the General Counsel will be referred to as the "General Counsel."

FINDINGS OF FACT

I. JURISDICTION

Respondent, a limited partnership, is engaged in the retail sale of grocery items for home preparation and consumption, and has operated stores throughout the state of Virginia, including the store at issue in this case, Kroger 538 (Kroger 538), located in Portsmouth, Virginia. During the 12-month representative period ending on November 30, 2015, Respondent, in conducting its operations, derived gross revenue in excess of $500,000. During the same period, Respondent purchased and received at Respondent's facility goods valued in excess of $5000 directly from points located outside the State of Virginia. Therefore, Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[3]

Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Union and Respondent, I make the following

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Operations

From at least 1997 until it closed on April 11, 2015, Respondent operated Kroger 538 located at 5601 High Street West, Portsmouth, Virginia. For all material times, Diego Duran (Duran), Respondent's district human resources coordinator, and Donati High (High), Respondent's Kroger 538 manager, were supervisors and agents of Respondent within the meaning of Section 2(11) and (13) of the Act.

Kroger 538 was situated on a parcel of land comprised of about 55,000 square feet of "surface area" within a retail shopping center owned by Sterling Creek Commons, Limited Partnership (the landlord). During that time, Respondent leased this property for Kroger 538 from the landlord. Kroger 538 was one of several tenants in this retail shopping center, and shared with those cotenants a right of easement to the common parking lot. Part of the property leased by Respondent for Kroger 538 also included a sidewalk in front and an enclosed foyer which provided the entry and exit points for customers.

The part of the lease agreement between Respondent and the landlord for Kroger 538, relevant to this case, reads as follows:

[3] See Joint Exhibit 2 (Jt. Exh. 2) in which the parties have stipulated to a number of facts concerning this case. Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "U. Exh." for Union's exhibit; "G.C. Br." for General Counsel's brief; "R. Br." for Respondent's brief; and "U. Br." for Union's brief. Specific citations to the transcript and exhibits are included where appropriate to aid review, but are not necessarily exclusive or exhaustive.

> To the extend not prohibited by applicable laws, the Parking Areas and Common Facilities shall be subject to a uniform 'no solicitation/no loitering' rule, pursuant to which all soliciting, loitering, handbilling and picketing for any cause or purpose whatsoever shall be prohibited within the Parking Areas and Common Facilities. Either Landlord or Tenant may enforce said uniform 'no solicitation/no loitering' rule, to the extent it can be done in a lawful manner, by excluding or removing persons engaged in soliciting, loitering, handbilling, or picketing from the Parking Areas and Common Facilities or by otherwise lawfully enforcing said rule. Tenant shall have the right, coupled with an interest, and is hereby expressly authorized by Landlord to enforce in a lawful manner said uniform 'no solicitation/no loitering' rule within the Parking Areas and Common Facilities…

(Jt. Exh. 2, p. 3.) There is no dispute in this case that the landlord vested in Respondent, through the language in this lease agreement, sufficient property interest and authority to enforce the lease agreement's "no solicitation/no loitering" rule. (Id.)

Further, the landlord's representatives sent a three-page letter, dated March 25, 2014, to Fenton Childers (Childers), Respondent's real estate manager for its Mid-Atlantic marketing area regarding Kroger 538. The landlord expressed concern with "continuous and smooth operation of the shopping center" and prevention of "disruptive activities or nuisances that have a potentially adverse impact on our tenants and their customers, our shopping center and the community at large." (R. Exh. 1.) The landlord further advised that:

> For the above purposes and to facilitate a prompt response to situations which may arise in connection with any protesting, demonstrating, picketing, hand billing or related disruptive activities on the premises, the undersigned Landlord for the above referenced location(s) hereby states that, to the maximum extent permitted by law, no person or organization (whether or not involving a labor union) shall be permitted to engage in such activities within the property limits owned by us, including that portion on which your store currently operates its business under the terms of our Lease, and any such person or organization shall be dealt with as a trespasser and removed from the property owned by us and/or leased by your organization. Landlord further agrees that should any such person or organization engage in such activities on our property Landlord gives Kroger Limited Partnership I the authority to have police or other authorities, to the extent permitted by law, remove the trespassers from the property referenced.

The letter also authorized Respondent to post signs at appropriate locations on the shopping center premises and otherwise notify "protesters, demonstrators, picketers, hand billers or other trespassers that no such activity or solicitation is permitted. . . ." This also included the right to "paint up to a 6 [inch] wide blue line, on the pavement and grass area just inside the property lines in and around the entrances and exits for the noted property in order to assist in keeping protesters, demonstrators, picketers, hand billers or other trespassers off the property." (Id.)

There is no evidence, however, showing that Respondent, its supervisors or agents placed any such signs or blue lines on the Kroger 538 property.

Further, there is no evidence that Respondent maintained any of its own formal or written no solicitation/no distribution/no loitering or trespassing policy or rule. It did, however, as described below, on numerous occasions, over an extended period of time, allow various charitable/nonprofit organizations to set up tables, solicit for monetary donations, sell goods, and distribute literature on the side walk on either side of the entrance in front of Kroger 538. And, on at least two occasions, allowed, through its supervisors and/or agents at Kroger 538, two of these groups to solicit and disseminate information and services in the store parking lot.

B. The Union and Solicitation at the Kroger 538

Union organization and store closings

The Charging Party Union is and has been for all times material to this case a labor organization within the meaning of Section 2(5) of the Act. Since about March 28, 2010, through the present, the Union has been the collective-bargaining representative of all employees, except store management, professional pharmacy department employees, pharmacy technicians, store department heads, wine specialists, security employees, demonstrators and all clerical employees in certain of Respondent's stores in the Hampton Roads, Virginia area, including Kroger 538. Respondent and the Union are parties to a collective-bargaining agreement (CBA) that has been in effect from August 3, 2014, through August 4, 2018. (Jt. Exhs. 1–2).

To better understand the issues in the complaint, it is important to describe, for background purposes only, the underlying dispute between the Union and Respondent. Respondent opened two new large Kroger marketplace stores in November (store 542 in Portsmouth, Virginia) and December (store 554 in Suffolk, Virginia) of 2014. Shortly thereafter, Respondent began the process of closing other stores, including Kroger 538. As a part of the closing process, Respondent, through its Human Resource Manager Duran, engaged in meetings with its affected Kroger 538 employees (also referred to as associates) and their union representative, Heith Fenner (Fenner), for several weeks before Kroger 538 closed. Respondent, through Duran, discussed with and ultimately offered Kroger 538 employees transfer opportunities. One of the main points of contention arising out of those meetings was Respondent's refusal to offer its affected Kroger 538 employees transfers to the new nonunion Portsmouth Kroger marketplace store located only a few miles from Kroger 538, or the other newly opened marketplace store in nearby Suffolk. Rather, Respondent only offered reassignment to its unionized stores, with "key roles" to be filled in Virginia Beach stores and the remaining positions in Kroger store 555 in Yorktown, Virginia. In particular, the Yorktown store is about 25 miles away from the former Kroger 538, and requires a long bus ride with transfers for those employees without their own transportation. (Tr. 41–44.)[4] Thus, it was the

[4] Although Duran testified that the new Kroger marketplace stores were already fully staffed at the time Kroger 538 was closing, he also made it clear that the Local 400 represented Kroger 538 employees were only offered transfer positions to other unionized stores. (Tr. 42.)

Union's belief that Respondent intentionally denied Kroger 538 union employees such employment in order to avoid unionization at the new nonunion Kroger marketplace stores. [5]

Respondent closed Kroger 538 on about April 11, 2015, and its union employees who opted to continue working for Respondent transferred to one of the other union stores.

Union petition solicitation at Kroger 538

On April 2, while Duran and Fenner met with Kroger 538 employees to finalize relocation talks, another nonemployee union representative and organizer, Brandon Forester, began peacefully soliciting customers in the parking lot in front of Kroger 538.[6] Forester did so to garner customer support of the Union's efforts by asking Kroger 538 customers to sign a petition in protest of Respondent's decision to transfer Kroger 538 employees to its stores outside of the Portsmouth area. The petition contained a logo, "#KrogerStrong SOLIDARITY with Virginia Kroger Workers," and stated:

> As a loyal Kroger customer and member of the Portsmouth community I am appalled that Kroger is taking good jobs out of our town and forcing the employees who have helped me at my store for years move to a store over 25 miles away.
> **I will not shop at either of the newly opened Marketplace stores unless the employees at this store are allowed to transfer there with all the benefits they currently enjoy as union members.**

(GC Exh. 3.) At some point during a break or after his meeting with Duran ended, Fenner joined Forester in the parking lot. There is no evidence that Fenner actually assisted Forester in asking customers to sign the petition, but he did support his efforts.

After being advised that union agents were soliciting in the parking lot, Kroger 538 manager, Donati High (High), notified Duran, and in turn Duran called his district manager for guidance on how to handle the situation. According to Duran, he was told to get a copy of the above—referenced March 2014 letter from the landlord, regarding its no-solicitation policy and instructions for Kroger 538. (Tr. 45–47; R. Exh. 1.) Once they found the letter, Duran and High went out and confronted Forester, who by that time had been joined by Fenner. [7] Duran and High showed them the letter, told them that they were not authorized to solicit on the premises and told them to leave Respondent's property. Duran testified that one of the Union agents (he could not recall which one) responded "that they would only listen to the blue," which he interpreted to mean that they would only leave if told to do so by the police. (Tr. 28–

[5] Apparently, the Union has raised these "double breasting" allegations in another case, which is not before me to consider or decide. Therefore, as stated, they are only mentioned to show the backdrop against which the Union in this case sought to petition for public support of its position that Respondent was wrongfully displacing its union employees.

[6] There is no evidence whatsoever that Forester's union activity in Respondent's parking lot caused any disruption, or that it was anything but peaceful.

[7] Duran testified that this was his first time seeing this letter, and believed that it was on file in the store. High also testified that he first saw the landlord letter on April 2, but he did not know where or how it was found. He only knew that Duran helped him find it. (Tr. 154–155.)

29.) High recalled that it was Forester who made this statement, and Fenner did not recall anyone making or hearing it.[8] There is no dispute, however, that Forester refused to stop soliciting in the parking lot, until asked to do so by the police.

Fenner disagreed with Duran and High that the landlord letter purportedly shown to him and Forester was the three page letter admitted as Respondent Exhibit 1. Rather, he testified that he and Forester were quickly shown a one page document and denied an opportunity to copy it. Duran recalled that Forester took a picture of the letter. (Tr. 48–49, 58–61.) I find it rather unusual and unbelievable that neither Duran nor High could recall how or where they found the landlord's letter, especially since it was the first time that they had seen or heard of it. It is unnecessary, however, to resolve this disagreement, as the material facts necessary for me to make a decision in this case remain undisputed.

Duran and High returned to the front or foyer of the store, and according to Duran, followed further instruction from the district manager (via telephone), to call the police if Forester continued to approach people in the parking lot. In the meantime, Forester continued to approach customers. Neither Duran nor High could recall which of them actually called and talked to the police. Although there was disagreement about who said what and what was specifically said during the encounter between management officials and union officials in Respondent's parking lot, and also as to whether Duran or High called and spoke to police officers, there is no dispute that Duran or High called the police and requested to have them stop the Union's solicitation efforts in the Kroger 538 parking lot.[9] There is also no dispute that when asked by the police officers, Forester left the premises, and Fenner returned to the store.

Fenner perceived that both Duran and High became irritated and angry with him and Forester in the parking lot, and that Duran's attitude towards him changed from the time they had been discussing the employee transfers. On the other hand, Duran claimed that they "very professionally and calmly" approached them. It would not be surprising that High and Duran became upset during their encounter with the union representatives in the parking lot since Forester initially refused to leave, even after they threatened to call the police. There is no doubt, however, that Duran and High did not want the Union soliciting at Kroger 538.

C. Respondent's Practice Regarding Solicitation Requests from Other Organizations

Although Kroger 538 did not have any formal or written policies regarding how to handle organizations' requests to solicit on Kroger 538's property, several of its former managers testified that the unofficial policy or practice was to forward all requests to the store manager to review and either approve or disapprove them. They agreed that throughout the years they allowed various charitable organizations to solicit for donations or to sell items on the sidewalk near the entrance of Kroger 538, and at times in the parking lot. They did not,

[8] I credit testimony that Forester told Duran and High that he would not leave unless asked or told to do so by the police. High remembered Forester saying that he would continue to get signatures until the police came, and would only then leave the property. (Tr. 58–61, 144–145.)

[9] Duran testified that he believed that High called the police, and that "I'm not sure what he told them." (Tr. 48–49.) High did not know whether he or Duran called the police, nor what was specifically said to them. (Tr. 159–160.)

however, approve requests from noncharitable organizations, religious groups or unions. None of them kept copies of those requests or their decisions to permit or not permit groups to solicit.

In addition, two former Kroger 538 employees observed several charitable organizations, as well as others, regularly or on numerous occasions, asking for donations, selling items or distributing flyers outside the entrance to Kroger 538 and in its parking lot. Former Kroger 538 employee, Tonja Edwards (Edwards), testified that during her 7 year tenure at the store (and up until the store closed in April), she observed several organizations passing out literature and/or selling goods on the sidewalk area on either side of Kroger 538's front doors.[10] They included the Girl Scouts selling cookies for a week or more in the Spring of every year; the Lion's Club collecting donations or selling items on two occasions; the Salvation Army collecting donations on the weeks between Thanksgiving and Christmas each year; and a breast cancer awareness group soliciting donations, passing out literature and selling items on one occasion. She also recalled a church group (Victory) collecting donations to assist the homeless and battered women and leaving flyers on cars on an almost daily basis during the summer time. Edwards admitted that she did not know whether or not Respondent granted any of these groups permission to be on the property. (Tr. 77–87, 89–91.)

Another long time former Kroger 538 employee (for over 16 years prior to the store closing in April), Laverne Wrenn (Wrenn),[11] testified that she witnessed the Girl Scouts selling cookies annually; the Boy Scouts asking for donations on one occasion; the Lions Club soliciting donations, and selling items such as brooms and/or collecting old eyeglasses, on several occasions; a breast cancer awareness group selling trinkets and baked goods about twice each year; and the Salvation Army collecting donations for several weeks during the Thanksgiving and Christmas holidays. Wrenn also recalled that on one occasion about 4–5 years before, Respondent had permitted the American Red Cross to run its mobile blood drive in the parking lot of Kroger 538. She testified that store management even posted flyers about and encouraged employees to participate in this event. (Tr. 92–108.) Wrenn also observed college students selling encyclopedias in the store parking lot on multiple days over several summers, and recalled buying a set for her niece. In addition, she saw members of the Victory church group soliciting for donations, as well as local dance club promoters placing flyers on cars in the Kroger 538 parking lot and other of the shopping center's tenants leaving flyers which advertised their businesses (a Chinese restaurant and a chiropractor). (Id.) Like Edwards, Wrenn had no idea whether or not Respondent had granted any of these groups permission to solicit or distribute on its premises, or had prohibited them from doing so.

Respondent sought to challenge Wrenn's credibility by pointing out that she had been a Union steward and now worked directly for the Union; that she never mentioned the boy scouts or the American Red Cross in her Board affidavit; and that her affidavit testimony, about how she had communicated customer complaints about the church group to management, was inconsistent with her hearing testimony. At the hearing, it was pointed out that in Wrenn's Board affidavit, she stated that "[a]bout a year ago, a customer named Annemarie mentioned to

[10] Edwards testified that she transferred to the Yorktown store. (Tr. 89.)

[11] After Kroger 538 closed in April, Wrenn took a leave of absence and accepted a position with the Union as one of its business agents. While working for Respondent, she served as the Union's shop steward for Kroger store 538, as well as for stores 555 and 532. (Tr. 107–108.)

[her] that a church group was soliciting in the parking lot and [she] said [she] had already reported it to management." (Tr. 114–116.) At hearing, she testified that she informed High, in 2015, and another manager in 2014, that customers had complained about the church group soliciting in the parking lot, but that High just shrugged his shoulders and the other manager walked off. (Tr. 105–107.) On the other hand, High denied that Wrenn had reported any customer complaints about soliciting. Without rehashing the lengthy testimony regarding the discrepancy, I find that Wrenn's testimony on this point was confusing and inconsistent with her statements during the Board investigation. However, I also find that her relevant testimony regarding the organizations that came onto Respondent's property to solicit donations, sell items, or pass out information is credible, and generally consistent with Edward's testimony and that of Respondent's own management witnesses (see below).

High, who managed Kroger 538 from June 2014 until it closed, and thereafter became an associate manager of the new Portsmouth marketplace store, testified that while manager of Kroger 538, he based his standards for allowing organizations to solicit on what he had seen at other stores. He described them as "anything civic like the local fire department, military, veterans, the Lion's Club, those were typically the criteria for any just available dates because you don't want to over-swarm the customers." High did not recall seeing the Girl Scouts selling cookies, or a breast awareness group, but remembered the Salvation Army collecting donations, and Respondent's policy to support and encourage donations to the Salvation Army.[12] He also authorized the Lion's Club asking for donations and the local firefighters collecting donations during their boot drive in the Kroger 538 parking lot. (Tr. 157–158, 164–165.) At first, he testified that these authorized groups solicited at the store every month or two, but when asked on cross examination, he attempted to downplay the amount of times he approved solicitation requests by stating that "[m]y understanding that question was I got requests about that often. I didn't always agree to the request." (Tr. 159.)

High did not recall club promoters handling out leaflets in the parking lot or putting them on cars, nor the college students wearing backpacks and selling encyclopedias. He insisted that groups not authorized by him were not permitted on the property, and that prior to April 2, if he became aware of unauthorized groups approaching customers in the parking lot, he always told them to leave. He did recall the church group whom he told to leave the store parking lot on several occasions. He explained that they would leave once he advised them of the no- solicitation policy but continuously returned on multiple occasions such that he had to tell them to leave each time. However, he never called the police to have them removed or showed them the letter from the landlord. Nor did he seek advice from Duran or the district manager about what to do. Interestingly, High could not recall who told him about customers complaining about the church group in the parking lot, but knew that it was not Wrenn. (Tr. 149–150, 158–159.)

Prior to High, Timothy Lynch (Lynch) was the store manager at Kroger 538, for about 10 months up until June 2014. Before then, he was an associate store manager at the store for 3–4 years. During his tenure as manager, he required organizations to request permission to solicit on their (the organizations') letterhead. Then, he would notify the organization with his decision to approve or disapprove the request to solicit and/or distribute on Kroger 538

[12] High could not, however, deny that these charitable groups were permitted to solicit at Kroger 538. (Tr. 164.)

property. Lynch was not aware of any written or formal no solicitation/distribution Kroger policy, but implemented his own requirement that the organization be nonprofit. He believed, however, that "it was Kroger standards not to do anything that had to do with religious groups or political groups or anything like that. It was more or less the Boy Scouts, the Girl Scouts, veterans, disabled veterans funds, not much more than that." Lynch was somewhat equivocal about what he believed Respondent's unofficial policy to be, later stating that it referred to "…anybody going through and soliciting, stopping flow of traffic, soliciting something that is unwanted or unwarranted as far as what my customers may have perceived, something that was promoting an outside business that had no correlation and/or function to do with Kroger, those kinds of things." (Tr. 169-–70, 179.) Lynch specifically recalled seeing the Boy Scouts selling crafts and asking for donations in front of the store on an annual basis; the Salvation Army bell ringers on a daily basis, all day, between Thanksgiving and Christmas each year; college students selling books during summer break on numerous occasions; and veterans groups soliciting in front of the store. (Tr. 173–177) Like High, he also insisted that during the times that individuals were on the premises without permission, he would "immediately go out" and tell them to "cease and desist." However, he recalled telling the college students, whom he had seen a "couple of times," to leave only once. (Tr. 173.) Lynch was the only management official who remembered actually seeing the March 2014 landlord letter in 2014. He testified that he believed that it had issued in response to the Union wanting to solicit at the store.[13]

Finally, Raymond Helvie (Helvie), former co-manager/assistant manager for Kroger 538 from June/July 2013 until the store closed in April, testified that he referred solicitation requests from groups such as the Girl Scouts (who came out multiple times each year) or Lion's Club (came out every year) to his manager, High. He recalled other groups who were permitted to solicit outside the store on a regular basis, including the Salvation Army. He understood the store policy was to tell unauthorized individuals to leave, and that if they did not, "we'd call the police and they'd see it from there." However, I discredit his testimony that on one occasion, he actually called the police after an individual asking people for money in the parking lot refused to leave when he asked him to do so. This was not substantiated by High and Lynch, who did not recall ever having the police called prior to April 2, and, Helvie testified on direct examination that he was never forced to call the police when he told unauthorized individuals to leave. It is unbelievable that Helvie would have called the police without his former store managers' permission, or without them being told about it after the fact. (Tr. 181–186, 190–191.)

In sum, I find that Respondent regularly, and sometimes for extended periods each year, allowed other nonemployee organizations to solicit for money outright or by selling goods, and to distribute information to individuals on its sidewalks on either side of the entrance to Kroger 538. In addition, Respondent permitted at least two groups to solicit for donations (American Red Cross mobile blood drive and the local firefighters' boot drive) in their parking lot in front of Kroger 538. Respondent did not want or permit union representatives to solicit on its property.

[13] Lynch first testified that he had seen this letter in about March 2014. Then, he said that he first saw it the day before the hearing, but when asked again, admitted that he had seen the landlord's letter to Respondent in 2014. (Tr. 175–176.)

III. DISCUSSION AND ANALYSIS

A. Witness Credibility

A credibility determination may rely on a variety of factors, including, but not limited to, the context of the witness' testimony, the witness' demeanor, weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group,* 339 NLRB 303, 305 (2003); *Daikichi Sushi,* 355 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, and it is more common than not in all kinds of judicial decisions to believe some, but not all, of a witness' testimony. *Daikichi Sushi,* supra at 622. Indeed, in this case, I have believed witnesses on some points, but not on others. If there is any evidence not recited herein that might seem to impact the credited facts previously set forth and set forth below, I have not ignored such evidence, but considered it and determined it is not essential in deciding the issues, or I have rejected or discredited it as not reliable or trustworthy.

As previously discussed, I have credited Wrenn's testimony about which groups she observed soliciting on Respondent's premises, but not her testimony regarding how High or another manager at Kroger 538 responded to customer complaints. I do not credit High's testimony that he only allowed charitable groups to solicit sporadically. (Tr. 152.) First, it is inconsistent with his testimony as to how often these organizations solicited during his tenure at Kroger 538, and it is unsubstantiated by the testimony of Lynch, Helvie, Edwards, and Wrenn. Second, his credibility was further undermined when he backtracked on how many groups he permitted to solicit each month or two, and indicated that he thought he was asked how many requests he received (rather than those he actually approved). Thus, I find that High intentionally tried to downplay the number of times that he authorized groups to solicit.

Rather, on multiple occasions throughout each year, many charitable groups were permitted to solicit and distribute, and as with the Girl Scouts and the Salvation Army, did so for several weeks at a time.

B. Respondent Violated the Act by Excluding the Union from its Property

The General Counsel, relying on Supreme Court and Board precedent, alleges that Respondent violated the Act by discriminatorily prohibiting union representatives from soliciting for signatures on its petition while allowing other organizations to engage in solicitation activity on its premises. Respondent, on the other hand, relies on Circuit Court interpretation of Supreme Court and Board decisions, and argues that it lawfully excluded the Union's agents from its property because it did not engage in prohibited discrimination.

1. The Union engaged in protected activity

Initially, and contrary to Respondent's argument, I find that the Union's activity of soliciting signatures for the petition in support of its affected member employees was protected under the Act. It is well established that union representatives have a statutorily protected right

to engage in peaceful handbilling. This is the case when the handbill is a form of communicating consumer information about a union's dispute with an employer, consumer boycotting, or even in the form of secondary handbilling. No matter which of these forms it might take, it is clearly protected under Section 7 of the Act. *Glendale Associates, Ltd.,* 335 NLRB 27 (2001), citing *Oakland Mall*, 316 NLRB 1160, 1163 fn. 14 (1995), enfd. 74 F.3d 292 (D.C. Cir. 1996). Here, Forester, a nonemployee union representative, solicited potential customers of Respondent in the shopping center parking lot. There is no doubt that Forester did so on behalf of the Union, and the employees it represented, in protest of Respondent's decision not to transfer Kroger 538 employees to the new Kroger Marketplace stores, and to garner support for the Union's efforts in that regard. Therefore, I find that the Union's activity in this case constituted protected activity under the Act.

2. Respondent's discriminatory actions violated the Act

The Supreme Court has long held that an employee may limit nonemployee distribution of union literature so long as it does not discriminate against unions by allowing others to do so. *Lechmere, Inc., v. NLRB,* 502 U.S. 527 (1992); *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956). Following these decisions, the Board has consistently concluded that an employer that denies a union access to solicit and distribute on its property while regularly allowing nonunion organizations to do so unlawfully discriminates against union solicitation. *Salmon Run Shopping Center,* 348 NLRB 658, 662 (2006), enf. denied in relevant part 534 F.3d 108 (2008). See also *Big Y Foods,* 315 NLRB 1083 (1994); *Victory Markets,* 322 NLRB 17 (1996).[14]

Besides discrimination, the Court in *Babcock & Wilcox* also established another exception to an employer's ability to limit nonemployee union distribution of literature on its premises: if the union has no other available reasonable channels of communication that will enable the union to reach employees with its message. See *Babcock & Wilcox*, supra at 112. However, since that exception has not been raised in this case, the only issue before me is whether or not Respondent discriminated against the Union when it excluded it from soliciting and distributing on its premises while allowing other groups to do so.

I agree with the General Counsel that the controlling case here is *Sandusky Mall Co.,* 329 NLRB 618 (1999), enf. denied in relevant part 242 F.3d 682 (6th Cir. 2001). In *Sandusky Mall*, union representatives engaged in peaceful handbilling at a store entrance, asking the public not to patronize the store because of its use of a nonunion contractor on a construction project. In response, mall security guards asked the handbillers to leave on two occasions and, when they refused to do so, they called the police and charged the union representatives with trespass. The evidence showed that before and after that incident, mall owners had authorized solicitation and/handbilling inside the mall by charitable, civic and other types of groups. Consequently, the Board determined that the mall owners' authorization of solicitation by those other groups, while selectively excluding the union agents, constituted sufficient evidence of disparate treatment and violation of the Act. 329 NLRB at 618–619, 621.

[14] This precedent presupposes that the employer must have a property interest which entitles it to exclude individuals from the property. However, as previously stated, it is undisputed that the General Counsel conceded, and the parties agreed, that Respondent possessed such an interest in this case.

The facts in this case are essentially indistinguishable from those in *Sandusky Mall*. The Union's organizer, Forester, had been peacefully soliciting potential customers to sign a petition in protest of Respondent's refusal to allow affected unit employees to transfer to Kroger Marketplace stores nearby. When he refused to cease this protected activity and leave the shopping center parking lot after Duran and High asked him to do so (and threatened to call the police), Duran and High called the police, and had them remove Forester from the premises. Moreover, the evidence shows that Respondent permitted solicitation on its property by other groups on a regular, extensive and annual basis throughout the year, including, but not limited to, the Girl Scouts, the Salvation Army, Lion's Club, local firefighters and Boy Scouts. In doing so, I find, as the Board did in *Sandusky Mall*, that Respondent discriminatorily enforced its no-solicitation policy against the Union, and therefore violated the Act.

Respondent's managers denied that they permitted noncharitable groups to solicit in Kroger 538's parking lot. They testified that they always told unauthorized groups and individuals to leave, and that the groups or individuals left without necessitating a call to the police. High further testified that even though the groups and individuals left each time he asked them to do so, one of the local church groups returned on multiple occasions. However, High admitted that when they returned, he never showed them the landlord's no-solicitation/no-loitering letter or called the police as he did with the union representatives. I find that Respondent's unprecedented act of calling the police to remove the union representatives, while failing to do so with the same church group members who ignored him and repeatedly returned to solicit donations on Kroger 538 premises, also constitutes evidence of discriminatory conduct on Respondent's part.

3. Respondent's defenses fail

Respondent argues that it did not violate the Act because it "consistently enforced the policy prohibiting solicitation, loitering, handbilling, and picketing contained in its lease for Store 538" by also denying access to other unauthorized groups. (R. Br. at 3.) In support of this argument, Respondent points to the testimony of High and other former Kroger 538 managers that whenever they were made aware of any impermissible solicitation, they took immediate action to stop it by advising groups and/or individuals of the policy prohibiting solicitation and loitering, and asking them to cease activity and vacate the premises. This "effective [policing of] unauthorized solicitation at Store 538" argument fails, however. (R. Br. at 16.) According to *Sandusky Mall*, supra, it matters not that Respondent may have taken action, through its various managers, to deny or exclude other unauthorized groups or individuals, whose messages it deemed to be undesirable or potentially offensive to customers (for example, church groups soliciting for donations). 329 NLRB at 622. The Act does not protect such nonunion activity. Rather, it protects union solicitation and distribution of information, when employers, at the same time, permit other charitable, civic, or promotional activities. Therefore, Respondent still violates the Act under these circumstances, even if it also denies other unions or groups that it does not want on its premises.

I note here that Respondent not only discriminatorily enforced the neutral no solicitation policy in its lease, and the not so neutral March 2014 landlord letter, but also in effect adopted,

implemented and enforced its own unofficial discriminatory policy of permitting certain charitable organizations to solicit donations, sell items, and distribute literature. According to the relevant lease language, the common facilities, including the parking areas, "shall be subject to a uniform 'no solicitation/no loitering' rule, pursuant to which all soliciting, loitering, handbilling and picketing for any cause or purpose whatsoever shall be prohibited." While the lease provided Respondent with sufficient property interest and authorization to uniformly enforce this policy, the lease forbade all solicitation, loitering, handbilling, distribution, or any such activity by any groups or individuals, charitable or otherwise. On the other hand, the tenor of the March 2014 landlord letter, on which Duran and High relied to have Forester removed, was not so neutral. I find that it clearly targeted unions and other groups that wanted or tried to protest, demonstrate, picket, handbill, or otherwise engage in what was considered to be "related disruptive activities on the premises."[15] Therefore, Respondent in its reliance on this letter and its own unwritten practice and policy, discriminated against the Union, and violated the Act. (Jt. Exh. 2; R. Exh. 1.)

Respondent also argues that it should prevail since the Circuit Courts of Appeal have adopted a consensus position regarding "occasional charitable solicitation." Respondent points to Circuit Courts that have "repeatedly rejected" Board decisions "interpreting the 'discrimination' exception to be implicated by the act of permitting occasional civic or charitable solicitation activities." (citing *Be-Lo Stores v. NLRB*, 126 F.3d 268 (4th Cir. 1997); *Sandusky Mall Co. v. N.L.R.B.,* 242 F.3d 682 (6th Cir. 2001)). As noted by Respondent, the Fourth Circuit in *Be-Lo Stores* rejected the Board's finding that "apparent acquiescence" in solicitation by certain religious and charitable groups over the course of several years prevented the employer from enforcing a nonsolicitation policy to union organizers. In that case, the Fourth Circuit stated that:

> To affirm the Board's contrary finding on this record would be tantamount to a holding that if an employer ever allows the distribution of literature on any of its property, then it must open its property to paid nonemployee union picketers. We are confident that the Supreme Court never intended such a result.

Be-Lo Stores, 126 F.3d at 285.

Similarly, the Sixth Circuit also rejected the Board's interpretation of the discriminatory exception in *Sandusky Mall Co. v. N.L.R.B.*, supra. In doing so, the Sixth Circuit relied on one of its prior decision which interpreted the term "discrimination" as used in *Babcock & Wilcox*, supra, to mean "favoring one union over another, or allowing employer-related information while barring similar union-related information." *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 465 (6th Cir. 1996).

I am mindful of the Courts' reasoning, in *Sandusky Mall Co. v. N.L.R.B.*, for rejecting the Board's determination. See also *Salmon Run Shopping Center v. NLRB*, 534 F.3d 108, 116 (2d Cir. 2008). However, where there is a conflict between court and Board law, the Board's duty to apply uniform policies under the Act, as well as the Act's venue provisions for review

[15] No one disputed Lynch's testimony that this letter issued in response to the Union's desire to solicit at Kroger 534.

of Board decisions, preclude the Board from acquiescing in contrary decisions by the courts of appeals. *Tim Foley Plumbing Service, Inc.,* 337 NLRB 328 fn. 5 (2001). Moreover, I am bound by Board law which has not been overturned by the Supreme Court. *Iowa Beef Packers*, 144 NLRB 615, 616 (1963); *Waco, Inc.,* 273 NLRB 746 fn. 14 (1984). Therefore, the Board's decision in *Sandusky Mall* and its progeny remains, and is applicable here.

Likewise, I am even more mindful that in its *Sandusky Mall* decision, the Board fully addressed and the Sixth Circuit's rejection of the Board's *Babcock & Wilcox* interpretation of "discrimination." The Board did so in its *Sandusky Mall* discussion of *Cleveland Real Estate Partners*, supra. In *Cleveland Real Estate Partners*, supra, the Board adopted the administrative law judge's finding that the employer discriminatorily prohibited nonemployee union representatives from distributing handbills to shoppers in order to discourage them from patronizing a nonunion retailer since the employer had allowed non labor related handbilling and solicitations by others in the mall. The Board "respectfully [disagreed] with the Sixth Circuit's conclusion and [adhered] to [its] view that an employer that denies a union access while regularly allowing nonunion organizations to solicit and distribute on its property unlawfully discriminates against union solicitation." *Sandusky Mall*, supra at 620.

Respondent admitted that "[a]s part of its community outreach efforts, Kroger 538 'occasionally' permitted charitable groups such as the Salvation Army to solicit donations in front of the store." (R. Br.) Respondent argues, however, that the instances when it permitted charitable groups access to solicit were 'sporadic based upon request' and that the requests, not always granted, totaled only about one occasion every month or two. Thus, Respondent also asserts that it meets the narrow exception set forth by the Board in *Hammary Mft. Corp*., 265 NLRB 57 fn. 4 (1982). (Tr. 152, 159; R. Br.) In *Hammary Mfg. Corp.*, the Board acknowledged that "an employer does not violate Sec. 8(a)(1) by permitting a small number of isolated 'beneficent acts' as narrow exceptions to a no-solicitation rule. Id., citing *Serv-Air, Inc. v. N.L.R.B.*, 395 F.2d 557 (10th Cir. 1968), on remand 175 NLRB 801 (1969); *Emerson Elecric Co., U.S. Electrical Motors Division*, 187 NLRB 294 (1970). The Board further noted that "[t]hus, rather than finding an exception for charities to be a per se violation of the Act, the Board has evaluated the "quantum of…incidents' involved to determine whether unlawful discrimination has occurred. *Hammary Mfg. Corp.*, supra, citing *Serv-Air, Inc.*, 175 NLRB 801 (1969); *Saint Vincent's Hospital*, 265 NLRB 38 (1982).

In *Albertson's Inc.*, 332 NLRB 1132, 1135–1136 (2000), the respondent excluded union representatives, as well as certain other groups such as political organizations and unknown charities, from soliciting and distributing information on the premises of its grocery stores. At the same time, the respondent permitted other organizations such as the Salvation Army bell ringers soliciting donations for about a month each year between Thanksgiving and Christmas; Camp Fire Boys; Boys and Girls Clubs; Boy Scouts; Brownies; various veterans groups and other youth and school organizations to do so immediately outside the entrance of its stores. The Board in *Albertson's Inc.* relied on *Sandusky Mall*, supra at 622 (quoting Reisbeck Markets, 315 NLRB 940, 942 (1994), enf. denied 91 F.3d 132 (4th Cir. 1996) (unpublished decision)., stating that "such a policy 'amounts to little more than an employer permitting on its property solicitation that it likes and forbidding solicitation that it dislikes.'" *Albertson's Inc.*,

332 NLRB 1132, 1135–1136.[16] Thus, the Board refused to expand this narrow exception to hold that an employer may lawfully restrict union solicitation if it allows only charitable organizations. (Id at 1136.) Rather, it found that "the solicitation permitted by the Respondent in the immediate exterior of its store exceeds the small number of isolated beneficent acts that the Board regards as a narrow exception to an otherwise valid, nondiscriminatory no-solicitation policy." Id., citing *Sandusky Mall*, supra, slip op. at 4 and fn. 14 (citing *Hammary Mfg. Corp.*, 265 NLRB 57 fn. 4 (1982).

In *Wild Oats Community Markets*, 336 NLRB 179 (2001), the respondent natural foods grocery store attempted to cause the removal of union representatives engaged in both handbilling and picketing in a parking lot in front of respondent's market. The Board majority not only found that such activity was protected, but also found that "[a]ssuming that proof of discrimination is necessary for the establishment of a violation in this case, the nonunion-concerned solicitations that Respondent did permit were hardly isolated, and they were not all 'beneficent'." (Id. at 179, 190.) Similarly, I find that the solicitation and distribution that Respondent did permit, even if once or twice a month, exceeded the isolated beneficent acts that the Board allowed in its narrow exception set forth in *Hammary Mft. Corp.,* supra. In this case, as shown, when Respondent allowed access to the Girl Scouts and Salvation Army in particular, they permitted them to solicit for donations and sell items for weeks at a time each year. This does not even include the other months throughout the year that Respondent authorized many other groups to solicit each month or so.

In further support of its "isolated beneficent acts" argument, Respondent sought to have me discredit testimony of witnesses Edwards and Wrenn regarding organizations that it permitted to solicit and distribute on its premises. Although I discredited Wrenn's testimony regarding management's reaction to customer complaints about a religious group asking for donations in the shopping center parking lot, I credited testimony regarding the various groups such as the Girl Scouts (several weeks/weekends each year) and the Salvation Army (several weeks each year between Thanksgiving and Christmas), who even according to Respondent's witnesses, were permitted to solicit for weeks as a time on an annual basis. (Tr. 73–91.) In sum, the credible evidence shows that throughout the years prior to April 2 and the closing of Kroger 538, Respondent has allowed many charitable organizations to set up displays, distribute literature and solicit donations on either side of the entrance into the store. And as previously stated, on at least two occasions, permitted two of these groups, the American Red Cross (blood donation mobile) and the local fire department (boot drive), to extend their activities into the parking lot in front of the store.

There is no distinction before the Board between union activity and beneficent acts, and clearly Respondent's acceptance of charitable and civic solicitation activity from several organizations, days and sometimes weeks at a time on an annual basis, goes beyond occasional or isolated instances. In consideration of Respondent's activities, and in light of the Board law discussed above, I conclude that Respondent has indeed violated the Act as alleged in the complaint by excluding union solicitation on its premises while at the same time favoring and permitting charitable and civic solicitation activity.

[16] *Albertson's Inc.*, 332 NLRB 1132 (2000), enf. denied, *Albertson's Inc. v. NLRB*, 301 F.3d 441 (6th Cir. 2002).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminatorily enforcing a no-solicitation policy by prohibiting representatives of the Union from soliciting and distributing petitions and information on Respondent's premises, by demanding that they leave, threatening to call the police and by calling the police to remove them, or in any other way interfering with them, Respondent violated Section 8(a)(1) of the Act.

4. The above violations are unfair labor practices within the meaning of the Act, and by engaging in them, Respondent violated Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Kroger Limited Partnership I Mid-Atlantic, Portsmouth, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily enforcing a no-solicitation policy by prohibiting and excluding the Union, United Food and Commercial Workers Union, Local 400, from soliciting or distributing information on the premises of its stores.

(b) Discriminatorily threatening to call the police and calling the police to have representatives of the Union removed from its premises.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post in English and other languages, as needed, and at its own expense, on its intranet copies of the attached notice marked "Appendix,"[18] if the Respondent customarily communicates with its employees by such means. Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted in this manner and maintained for 60 consecutive days from the date it was originally posted. In addition to electronically posting on its intranet or intranet site, the Respondent shall distribute the notices, at its own expense, electronically by email in English and additional languages, as needed, to all employees who were employed at Kroger 538, located in Portsmouth, Virginia, in April 2015 and until the completion of those employees' work at that job site. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at Kroger 538 any time since April 2, 2015.

Dated, Washington, D.C., September 9, 2016.

Donna N. Dawson
Administrative Law Judge

18 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT enforce no-solicitation policies in a discriminatory manner by prohibiting or excluding representatives of United Food and Commercial Workers Union, Local 400 from soliciting signatures, or otherwise engaging in lawful solicitation and distribution on our premises, or by threatening to call the police or by calling the police to remove them or in any other way interfering with them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

KROGER LIMITED PARTNERSHIP I MID-ATLANTIC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Bank of America Center, Tower II, 100 South Charles Street, Suite 600, Baltimore, MD 21201
(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-155160 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-2880.